

Agenda – Legislation, Justice and Constitution Committee

Meeting Venue:	For further information contact:
Video Conference via Zoom	P Gareth Williams
Meeting date: 4 October 2021	Committee Clerk
Meeting time: 13.30	0300 200 6565
	SeneddLJC@senedd.wales

Informal pre-meeting (13.00–13.30)

1 Introductions, apologies and substitutions

13.30

2 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3

13.30–13.35

Made Negative Resolution Instruments

2.1 SL(6)049 – The Health Protection (Coronavirus, International Travel and Notification) (Wales) (Miscellaneous Amendments) Regulations 2021

(Pages 1 – 3)

LJC(6)–08–21 – Paper 1 – Draft report

[Regulations](#)

[Explanatory Memorandum](#)

2.2 SL(6)052 – The Coronavirus Act 2020 (Residential Tenancies: Extension of Period of Protection from Eviction) (No. 3) (Wales) Regulations 2021

(Pages 4 – 8)

LJC(6)–08–21 – Paper 2 – Draft report

[Regulations](#)

[Explanatory Memorandum](#)

Draft Affirmative Resolution Instruments



2.3 SL(6)050 – The Allocation of Housing and Homelessness (Eligibility) (Wales) (Amendment) (No. 2) Regulations 2021

(Pages 9 – 10)

LJC(6)–08–21 – Paper 3 – Draft report

[Regulations](#)

[Explanatory Memorandum](#)

2.4 SL(6)053 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021

(Pages 11 – 15)

LJC(6)–08–21 – Paper 4 – Draft report

LJC(6)–08–21 – Paper 5 – Letter from the First Minister to the Llywydd, 24 September 2021

[Regulations](#)

[Explanatory Memorandum](#)

3 Papers to note

13.35–13.40

3.1 Correspondence from the Counsel General and Minister for the Constitution: Postponement of the Inter–Ministerial Group for Elections and Registration meeting

(Page 16)

LJC(6)–08–21 – Paper 6 – Letter from the Counsel General and Minister for the Constitution, 27 September 2021

3.2 Correspondence from the Minister for Climate Change: Response to the Committee's report on the Legislative Consent Memoranda on the Environment Bill

(Pages 17 – 20)

LJC(6)–08–21 – Paper 7 – Letter from the Minister for Climate Change, 28 September 2021

3.3 Correspondence from the President of Welsh Tribunals: Third annual report of the President of Welsh Tribunals

(Pages 21 – 37)

LJC(6)–08–21 – Paper 8 – Letter from the President of Welsh Tribunals, 28 September 2021

3.4 Written statement by the Welsh Government: Update on the development of the justice system and the legal sector in Wales

(Pages 38 – 40)

LJC(6)–08–21 – Paper 9 – Written statement by the Welsh Government, 30 September 2021

4 Motion under Standing Order 17.42 to resolve to exclude the public from the remainder of the meeting

13.40

5 Legislative Consent Memorandum on the Police, Crime, Sentencing and Courts Bill – consideration of draft report

13.40–13.55

(Pages 41 – 61)

LJC(6)–08–21 – Paper 10 – Draft report

LJC(6)–08–21 – Paper 11 – Letter from the Minister for Social Justice, 28 September 2021

LJC(6)–08–21 – Paper 12 – Letter to the Minister for Social Justice, 22 September 2021

6 Legislative Consent Memorandum on the Advanced Research and Invention Agency Bill

13.55–14.05

(Pages 62 – 68)

[Legislative Consent Memorandum – Advanced Research and Invention Agency Bill](#)

LJC(6)–08–21 – Paper 13 – Legal advice note

**7 Legislative Consent Memorandum on the Skills and Post-16
Education Bill**

14.05-14.15

(Pages 69 – 77)

[Legislative Consent Memorandum – Skills and Post-16 Education Bill](#)

LJC(6)-08-21 – Paper 14 – Legal advice note

8 Briefing note on international agreements

14.15-14.25

(Pages 78 – 82)

LJC(6)-08-21 – Paper 15 – Briefing note

SL(6)049 – The Health Protection (Coronavirus, International Travel and Notification) (Wales) (Miscellaneous Amendments) Regulations 2021

Background and Purpose

These [Regulations](#) amend the Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020 (“the International Travel Regulations”) (SI 2020/574) and the Health Protection (Notification) (Wales) Regulations 2010 (SI 2010/1546) (“the Notification Regulations”).

Specifically, these Regulations amend the International Travel Regulations by making the following changes:

- Bangladesh, Egypt, Kenya, Maldives, Oman, Pakistan, Sri Lanka and Turkey are removed from the “red list”; and
- to allow coronavirus day 2 and day 8 tests to be carried out by private sector test providers, provided they comply with specified requirements, including being appropriately accredited, having specified systems in place and making a declaration to confirm compliance.

In addition, these Regulations also amend the Notification Regulations by making the following changes:

- imposing requirements on diagnostic laboratories, sequencing laboratories and test providers to notify Public Health Wales of the results of covid-19 or influenza virus detection tests which they process; and
- imposing a requirement on diagnostic laboratories to report additional information where they process tests in accordance with the International Travel Regulations.

Regulation 15 requires the Welsh Ministers to review the effectiveness of the provisions made in the Notification Regulations by these Regulations before the expiry of the period of 12 Months beginning with the day after the day on which they come into force.

Procedure

Made Negative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.



Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following three points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note the Welsh Government's justification for any potential interference with human rights. In particular, we note the following paragraphs in the Explanatory Memorandum:

"The amendments contained in these Regulations do not change the engagement under the International Travel Regulations of individual rights under the Human Rights Act 1998 and the European Convention on Human Rights; the Government considers that they are justified for the purpose of preventing the spreading of infectious diseases and/or the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health, and are proportionate."

2. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note there has been no formal consultation on these Regulations. In particular, we note the following paragraph in the Explanatory Memorandum:

"Given the serious and imminent threat arising from coronavirus and the need for an urgent public health response, there has been no public consultation in relation to these Regulations."

3. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note the breach of the 21-day rule (i.e. the rule that 21 days should pass between the date a "made negative" instrument is laid before the Senedd and the date the instrument comes into force), and the explanation for the breach provided by Eluned Morgan MS, Minister for Health and Social Services, in a [letter to the Llywydd dated 20 September 2021](#).

In particular, we note the following from the letter:

"Not adhering to the 21 day convention allows these Regulations to come into force at the earliest opportunity and continue the four nation approach to international travel; in view of the changing evidence on risk in relation to this disease this is considered necessary and justifiable in this case."



Welsh Government response

A Welsh Government response is not required.

Legal Advisers

Legislation, Justice and Constitution Committee

29 September 2021



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Welsh Parliament

Legislation, Justice and Constitution Committee

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Agenda Item 2.2

SL(6)052 – The Coronavirus Act 2020 (Residential Tenancies: Extension of Period of Protection from Eviction) (No. 3) (Wales) Regulations 2021

Background and Purpose

Section 81 and Schedule 29 to the Coronavirus Act 2020 (“the 2020 Act”) provide protection from eviction by increasing the notice period a landlord is required to give a tenant when seeking possession. These [Regulations](#) extend the period during which increased notice must be given to tenants until 31 December 2021 (from the previous end date of 30 September 2021), and this will apply to tenancies granted tenancies under the Rent Act 1977 and the Housing Acts 1985, 1988 and 1996.

Specifically, these Regulations amend Schedule 29 to the 2020 Act (“Schedule 29”). Schedule 29 modifies various statutory provisions, relating to notices that need to be given in order to seek possession of dwellings, during “the relevant period”. The provision made by Schedule 29 was originally to end on 30 September 2020 (at the end of the relevant period). However, due to the continuing pandemic the “relevant period” has been extended several times by subsequent regulations. Regulations extended the period in relation to Wales until 31 March 2021, to the 30th June 2021 and then to September 30 2021. Regulation 2 of these Regulations further amends paragraph 1(1)(b)(ii) so that Schedule 29 has effect, in relation to Wales, until 31 December 2021.

Procedure

Made Negative.

The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd



We note the breach of the 21-day rule (i.e. the rule that 21 days should pass between the date a “made negative” instrument is laid before the Senedd and the date the instrument comes into force), and the explanation for the breach provided by Julie James MS, Minister for Climate Change, in a letter to the Llywydd dated 22 September 2021. In particular, we note the following in the letter:

“In the light of the ongoing pandemic, and the recent rise in case numbers and hospitalisations, the Welsh Ministers have concluded that there remains an urgent need to ensure that the number of tenants under threat of eviction from their homes is kept as low as possible. Doing so will assist with the containment of Coronavirus, ease the burden on frontline staff, and ensure tenants are provided with appropriate support. The Regulations make an important contribution to meeting that urgent need. In order to ensure that the provisions of Schedule 29 continue to apply after 30 September, the Regulations come into force on 30 September. Due to their immediacy, the Regulations have not been subject to consultation and there has been insufficient time to carry out a Regulatory impact Assessment in relation to them.”

2. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

These Regulations engage a landlord’s rights under Article 1 Protocol 1 of the European Convention on Human Rights (“A1P1”). The Committee note that the Regulations will only extend the relevant period for a specified period (up to 31 December 2021).

We note the Welsh Government’s justification for any potential interference with human rights. In particular, we note the following paragraph in the Explanatory Memorandum:

Paragraph 4.4 states: “Since the time when the relevant period was last extended, there have been improvements in the public health situation as a consequence of the success of the vaccine programme. However, there has been a recent increase in case numbers which has led to an increase in hospitalisations, albeit at a much lower rate than was the case before the roll out of the vaccination programme. The most recent short to medium term projections show that cases will continue to rise for some time. Therefore, since the virus is once again circulating widely in the community, delaying evictions will continue to help control its transmission.

Generally, the virus remains a serious threat to public health, which would be significantly exacerbated if the current wave of cases were accompanied by a sudden wave of evictions and a resultant increase in homelessness. This will remain true as we move into the winter months, where the impact of Covid-19, in conjunction with a possible resurgence in influenza infections and other normal winter pressures, may place the health service under significant strain. In these circumstances, taking continued action to limit the risk of a sudden spike in evictions so that public health continues to be protected, is considered appropriate.”



Taking the above comments into account, the Committee note that Landlords have already had restrictions imposed on them for a significant period of time. The restrictions originally contained in the Coronavirus Act in April 2020 were imposed on landlords until September 30 2020. Whilst the pandemic meant that it was considered proportionate by the Welsh Government to extend the “relevant period” on three previous occasions, the circumstances have since changed significantly and this has been reflected by legislation that has reduced the alert level for the whole of Wales to alert level zero. This has meant that restrictions in several sectors have been relaxed. The Committee would like further evidence from the Welsh Government that demonstrates that the action now being taken remains proportionate on grounds of human rights.

3. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

The Committee note that the Welsh Government have considered other options before deciding to extend the current restrictions for a further 3 months. Option B in the Explanatory Memorandum explores the possibility of taking a more graduated and proportionate action in relation to landlords given the improvement in the general picture of public health.

It states that *“recognising the positive impact that the vaccination programme has had on the public health situation, there is an argument that it might be appropriate to start reducing notice periods back towards their pre-Covid length.”*

The Committee note that a more graduated approach has been taken in England (not dissimilar to the option considered above) to take into account the improvements made in the risks to public health and to apply a proportionate response to how landlords may evict their tenants. The Regulations in England are drafted in a way that reduces and tapers down the notice periods from 6 months to 2 or 4 months depending on the circumstances and whether they are fault or no fault evictions. The Explanatory Memorandum for the Regulations in England state that *“this is to ensure that the measures remain proportionate to the public health risks.”*

The Committee note the options and reasons given in the Explanatory Memorandum and would like the Welsh Government to expand on and justify the legislative approach taken in these Regulations. Specifically, can the Welsh Government explain why it did not take a tapered approach similar to that in England given the positive impact of the vaccination programme.

4. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

We note there has been no formal consultation on these Regulations. In particular, we note the following paragraph in the Explanatory Memorandum:



“Given the emergency, it has not been possible to conduct any consultation on these Regulations and there is no statutory requirement to do so. However, the Welsh Government has strong relationships with stakeholders from across the housing sector; bodies representing landlords have been informally engaged on the purpose and effect these Regulations.”

5. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

The Committee note that no regulatory impact assessment has been prepared for these Regulations and the Explanatory Memorandum states:

“The COVID-19 emergency and the urgency to make these Regulations means it has not been possible to prepare a quantified Regulatory Impact Assessment.”

6. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues or public policy likely to be of interest to the Senedd.

These Regulations extend the period of time (by approximately 12 weeks) during which a landlord will be subject to the extended notice periods that must be given in order to seek possession of their property, and those extended periods will apply where a landlord wishes to seek possession because of unpaid rent. These Regulations, combined with the provisions made by the Public Health (Protection from Eviction) (Wales) Regulations 2021 and the Health (Protection from Eviction) (No. 2) (Wales) Regulations 2021 (which prevent, except in specified circumstances, attendance at a dwelling for the purpose of executing a warrant of possession or of delivering a notice of eviction) mean that landlords will have been subject to a number of restrictions on obtaining possession over a significant period of time. As this Committee pointed out previously, this may lead to financial difficulties for some landlords in the private rented sector, particularly small-scale landlords who may rely on their rental income to cover mortgage payments or as their only source of income. The Committee note the Welsh Government’s response to the Committee’s concerns raised in this regard for the Coronavirus Act 2020 (Residential Tenancies: Extension of Period of Protection from Eviction) (No. 2) (Wales) Regulations 2021. In that response, the Welsh Government acknowledged the potential adverse economic impact on Landlord’s but stated that the following support had been given to Landlord’s and the broader sector:

- *“£4.1 million to top up Department for Work and Pensions funding for Discretionary Housing Payments to help those in receipt of housing related benefits who are in rent arrears,*
- *funding of the Private Rented Sector (PRS) Debt Helpline to advise and support private sector tenants struggling with rent, income and housing benefits; delivered by Citizen’s Advice Cymru,*
- *funding of £166 million to local authorities in 2021-22 through the Housing Support Grant to deliver housing related support services. The services help to prevent people*



from becoming homeless, stabilizes their housing situation, or helps potentially homeless people to find and keep accommodation,

- *Providing additional funding through the Discretionary Assistance Fund (DAF),*
- *Our Tenancy Saver Loan scheme; which made low cost loans available to private sector tenants who suffered a temporary change of income and fell into rent arrears;*
- *Funding for Shelter Cymru to advise and support tenants.*
- *Our new Tenancy Hardship Grant, will support private rented sector tenants in Wales who are in significant rent arrears as a direct consequence of the pandemic."*

Given the lack of consultation, the absence of a regulatory impact assessment and the fact that these regulations are being brought into force at short notice breaching the 21 day rule, what, if any, action has the Welsh Government taken further to the measures listed in your previous response, to mitigate the economic effects of these Regulations on landlords.

Welsh Government response

A Welsh Government response is required for merits points 2, 3 and 6.

Legal Advisers

Legislation, Justice and Constitution Committee

29 September 2021



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Legislation, Justice and Constitution Committee

SL(6)050 - The Allocation of Housing and Homelessness (Eligibility) (Wales) (Amendment) (No. 2) Regulations 2021

Background and Purpose

These [Regulations](#) amend the provisions of the Allocation of Housing and Homelessness (Eligibility) (Wales) Regulations 2014 ("the 2014 Regulations"). The 2014 Regulations determine which persons from abroad are eligible for the allocation of housing accommodation under Part 6 of the Housing Act 1996, or for housing assistance under Schedule 2 of the Housing (Wales) Act 2014.

These Regulations extend eligibility for allocation of housing and housing assistance provided by local authorities. The extension provides for two new groups of people to be eligible for housing and housing assistance. These are:

- people with a Hong Kong British National (Overseas) visa who become destitute and have obtained a change to their immigration status enabling them to access public funds; and
- people entering the UK from Afghanistan under certain Home Office schemes or policies or who have recently left Afghanistan due to the collapse of the Afghan government (subject to certain conditions), and who have leave to enter or remain in the UK or do not require such leave.

These Regulations also provide for persons not subject to immigration control that have recently arrived from Afghanistan to be eligible for allocation of housing accommodation and housing assistance, where they left in connection with the collapse of the Afghan government.

Procedure

Draft Affirmative.

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument.



1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note there has been no formal consultation on these Regulations. In particular, we note the following paragraphs in the Explanatory Memorandum:

“As the Regulations in respect of the Hong Kong BN(O) provide a limited amendment, affecting a small number of individuals, a formal public consultation was not considered appropriate. The speed of the restoration of the Taliban regime in Afghanistan and the development at pace of the UK Government’s settlement schemes for the Afghan arrivals/returnees cohort also means there has not been time to consult on this aspect of the Regulations.”

Welsh Government response

A Welsh Government response is not required.

Legal Advisers

Legislation, Justice and Constitution Committee

28 September 2021



SL(6)053 – The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021

Background and Purpose

These [Regulations](#) amend the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020 (“the principal Regulations”).

These Regulations amend the principal Regulations (by inserting a new regulation 16A) to require certain premises to take reasonable measures to ensure that persons aged 18 years or over are only present on those premises if they have evidence that the person:

- has completed a course of doses of an authorised vaccine more than 14 days before the person enters the premises;
- has participated in, or is participating in, a clinical trial of a vaccine against coronavirus carried out in the United Kingdom in accordance with the requirements of the Medicines for Human Use (Clinical Trials) Regulations 2004;
- has a negative result from a qualifying test taken no more than 48 hours before the person enters the premises; or
- has a positive result from a polymerase chain reaction (PCR) test taken no more than 180 days and no less than 10 days before the person enters the premises.

In relation to a person that has completed a course of doses of an authorised vaccine, this evidence must be provided by or on behalf of the Welsh Ministers, the UK Government, the Scottish Ministers or a Northern Ireland department (what is commonly referred to as a “COVID pass”). Provision is made for equivalent evidence to be provided in relation to vaccines administered by a relevant country (EU and EEA countries, Andorra, Monaco, San Marino, Switzerland, the United States of America and Vatican City State).

The requirement to provide evidence applies in relation to:

- nightclubs and other places which serve alcohol and play music for dancing that are open at any time between midnight and 5am;
- premises where an event is being held, if the event is for over 10,000 people and they are all seated;
- premises where an indoor event is being held, if the event is over 500 and they are not all seated; and
- premises where an outdoor event is being held, if the event is over 4,000 and they are not all seated.



There are certain exceptions to the requirements based on the type of event (for example, protests, picketing and mass participation sporting events) and exemptions for certain persons (for example those who are working or volunteering at an event).

These Regulations amend the principal Regulations to create a new offence of providing false or misleading evidence of vaccination or testing status.

These Regulations also amend the principal Regulations to permit enforcement officers to issue premises improvement notices and premises closure notices where a responsible person does not comply with their obligation to take measures of checking evidence under the new regulation 16A.

Procedure

Draft Affirmative.

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following four points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note the Welsh Government's justification for any potential interference with human rights. In particular, we note the following paragraphs in the Explanatory Memorandum:

"Whilst the principal Regulations, as amended by these Regulations, engage individual rights under the Human Rights Act 1998 and the European Convention on Human Rights, the Government considers that they are justified for the purpose of preventing the spreading of infectious diseases and/or the interference is permitted on the basis that it is in pursuit of a legitimate aim, namely of protecting public health, and are proportionate.

Article 5 (right to liberty), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 11 (freedom of assembly and association) and Article 1 of the First Protocol (protection of property) are engaged by the principal Regulations.



Each of these is a qualified right, which permits the Welsh Ministers to interfere with the exercise of the rights if necessary in a democratic society in the interests of public safety or for the protection of health. All such restrictions and requirements must be justified on the basis that they are in pursuit of a legitimate aim, namely of protecting public health, and are proportionate. Any interference with these rights also needs to be balanced with the state's positive obligations under Article 2 (right to life). The adjustment of the requirements under the principal Regulations by these Regulations is a proportionate response to the spread of coronavirus. It balances the need to maintain an appropriate response to the threat posed by coronavirus against the rights of individuals and businesses, in a manner which remains proportionate to the need to reduce the rate of transmission of coronavirus, taking into account the scientific evidence."

2. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note there has been no formal consultation on these Regulations. In particular, we note the following paragraph in the Explanatory Memorandum:

"Given the threat arising from coronavirus and the need for a prompt public health response, there has been no public consultation in relation to these Regulations."

3. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

We note there is no equality impact assessment for these Regulations. We note the following paragraph in the Explanatory Memorandum in relation to a summary impact assessment:

"A regulatory impact assessment has not been prepared in relation to these Regulations due to the need to put them in place urgently to deal with a serious and imminent threat to public health. However, a summary impact assessment was prepared and considered as part of the 21 day coronavirus review process in order to inform the decisions made. The summary impact assessment will be published as soon as practicably possible."

4. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

It is noted that the Explanatory Memorandum refers to *"taking into account the scientific evidence"* and that *"SAGE has advised that it is important to act early to slow down a growing epidemic"*. However, the Explanatory Memorandum does not contain any specific reference to the evidence on which Welsh Government relies when making provision under these Regulations.

We would be grateful if the Welsh Government could set out:



1. the evidence which shows that requiring certain settings to check evidence of vaccination, prior coronavirus infection or a recent negative test result will “*slow down a growing epidemic*”; and
2. how the Welsh Government will monitor the effectiveness of requiring certain settings to check evidence of vaccination, prior coronavirus infection or a recent negative test result.

Welsh Government response

A Welsh Government response is required.

Legal Advisers

Legislation, Justice and Constitution Committee

29 September 2021



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Welsh Parliament **Pack Page 14**

Legislation, Justice and Constitution Committee



Elin Jones MS
Llywydd
Senedd Cymru
Cardiff Bay
CARDIFF
CF99 1SN

24 September 2021

Dear Elin,

The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021

I intend to lay the draft Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021 and an accompanying Explanatory Memorandum on 27 September. The Regulations will be subject to the draft affirmative procedure and it may be helpful to know that I intend to hold the plenary debate for this item of subordinate legislation on 5 October 2021. I am grateful to the Legislation, Justice and Constitution Committee and its officials for agreeing to undertake their scrutiny ahead of the debate.

I am copying this letter to the Minister for Rural Affairs and North Wales, and Trefnydd, Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee, Siwan Davies, Director of Senedd Business, Sian Wilkins, Head of Chamber and Committee Services and Julian Luke, Head of Policy and Legislation Committee Service.

Yours sincerely

MARK DRAKEFORD

Bae Caerdydd • Cardiff Bay
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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Agenda Item 3.1

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref 2021/09/29 IGR

Huw Irranca-Davies MS,
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru

SeneddLJC@senedd.wales

27 September 2021

Dear Huw,

I wrote to you previously in accordance with the inter-institutional relations agreement to let you know that I would be representing the Welsh Government at an Inter-Ministerial Group for Elections and Registration on 29 September. Owing to the recent UK Government reshuffle the meeting has been postponed.

I will write again once the rescheduled date for the meeting has been confirmed.

Yours sincerely,

Mick Antoniw AS/MS

Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Agenda Item 3.2

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair, Legislation, Justice and Constitution Committee

28 September 2021

Dear Huw,

Thank you for your report of 23 September on the Legislative Consent Memoranda for the UK Environment Bill.

I am pleased to provide additional information as requested below.

Yours sincerely



Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

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Correspondence.Julie.James@gov.Wales

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Recommendation	Response
<p>Recommendation 1. A future environmental Bill introduced by the Minister should address devolved issues contained within the UK Government's Environment Bill, following appropriate consultation with stakeholders.</p>	<p>Accept in Principle</p> <p>Tackling the climate and nature emergencies are a priority for this Government.</p> <p>The Counsel General set out our ambitious first year legislative programme on 6 July and an announcement on future years of the legislative programme will be made by the First Minister in due course.</p> <p>Financial Implications - There are no financial implications arising as a result of responding to this recommendation</p>
<p>Recommendation 2. The Welsh Government should seek an amendment to the Bill removing concurrent plus regulation-making powers</p>	<p>Reject</p> <p>I have provided a detailed explanation to the Committee as to the appropriateness of taking concurrent plus powers within this Bill. We are taking these powers only in areas where a UK wide approach may be required.</p> <p>The inclusion of the carve out of Schedule 7B of the Government of Wales Act 2006 will ensure the Senedd can remove the Secretary of State's functions relating to Welsh devolved matters without the need for the Secretary of State's consent.</p> <p>I have committed to making regulations in the Senedd whenever possible and demonstrated that commitment by planning to bring forward Welsh legislation in respect of the Extended Producer Responsibility scheme for packaging and a Deposit Return Scheme for drink containers.</p> <p>Financial Implications – There are no financial implications arising as a result of responding to this recommendation</p>
<p>Recommendation 3. If recommendation 2 is not accepted, or the concurrent plus powers are not removed from the Bill by amendment, the Minister must explain the reasons why they have not been removed, and clarify:</p>	<p>Accept in principle</p> <p>As above, I have previously set out detailed rationale for the appropriateness of taking concurrent plus powers within this Bill.</p> <p>The use of concurrent plus powers will be exercised in so far as is necessary to</p>

<p>- the specific circumstances and timetable for the use of concurrent plus powers;</p> <p>- when she expects the concurrent plus powers to be removed from the Bill in accordance with principle 7 of the Welsh Government guidance referred to in paragraph 35 above.</p>	<p>achieve a specific policy aim. We will only consent to the Secretary of State legislating on our behalf where it is absolutely necessary. In all cases we will consider the potential to deliver outcomes through bringing forward regulations before the Senedd in the first instance.</p> <p>The nature of the powers sought mean there is not a clear timetable for when they will be used. Policy development is underway on a range of products where Extended Producer Responsibility could be applied, including packaging and a deposit return for drink containers. As future schemes are developed, we will consider the legislative approach, with particular consideration of the practical nature of how specific products are marketed and traded across the UK and Wales,</p> <p>For water quality it will be as the requirement for cross border regulation arises for the Rivers Severn, Wye and Dee.</p> <p>For REACH, concurrent plus powers will be used when the enforcement arrangements for chemicals require change in a way that cannot be achieved through Welsh powers alone or where it is more efficient to regulate jointly. This re-establishes the powers Welsh Ministers held prior to EU Exit in relation to REACH enforcement powers.</p> <p>In line with the guidance, I will keep the requirement for these concurrent plus functions under review.</p> <p>Financial Implications – Review, and any subsequent removal of the concurrent plus functions, will require policy and legal resources to make the necessary legislative changes.</p>
<p>Recommendation 4. The Minister should, in advance of the Senedd’s debate on the relevant consent motion, explain why the provisions noted in paragraph 51 of this report were not identified in Memorandum No 2 and confirm that the Senedd’s consent is required for their inclusion in the Bill.</p>	<p>Accept</p> <p>New Clause 137 (Amendments of Schedule 7B to the Government of Wales Act 2006) (now clause 144) was referenced in Memorandum 1 to ensure Members were aware of the proposal for its inclusion in the Bill. However it was not considered to</p>

require consent as, by virtue of paragraph 7 of Schedule 7B to GOWA 2006, the Senedd cannot make amendments to GOWA 2006. Therefore this provision was considered outside the competence of the Senedd.

In light of the Committee's report I have asked officials to look again at this issue. As the provision falls within the Standing Order subsection 29.1(ii), in that it modifies the legislative competence of the Senedd, I agree consent is required and accordingly the amendment should have been included in Memorandum 2.

The amendments to schedules 4, 5, 6, 7 and 11, relate to powers for the relevant national authority to make regulations. Memorandum 1 advised that the National Authority in relation to Wales is the Welsh Ministers and outlined the need for the consent of the Senedd to the powers within these Schedules. I consider the amendments added to those provisions were covered by the general requirement for consent outlined in Memorandum 1. Officials took the view that the amendments to clause 68 (litter enforcement – previously clause 67) were sufficiently substantive to include in Memoranda 2 as they were to the clause itself and placed additional requirements on the Senedd.

The motion for the Legislative Consent Debate on the Bill captures any provision that would fall within the legislative competence of the Senedd, not just those included in Memoranda 1 & 2. I will advise the Senedd of the requirement for consent to New Clause 137 (now clause 144) in my opening remarks to the debate and of the amendment to the schedules.



To:

Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee

28 September 2021

Dear Huw Irranca-Davies MS

THIRD ANNUAL REPORT OF THE PRESIDENT OF WELSH TRIBUNALS

I am pleased to send you my third annual report as President of Welsh Tribunals. It covers the period 1 April 2020 to 30 April 2021.

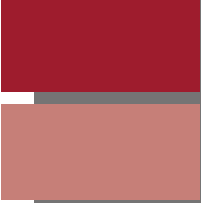
This year's report focuses, in particular, on important issues relating to reform and how the Tribunals have dealt with the very significant challenges posed by the spread of Coronavirus. A reasonably clear picture has emerged as to the effects of the pandemic but that is not to imply that further research upon its effects and how the Tribunals have responded is not necessary. Further, the pandemic has provided a springboard for a detailed assessment of how the Tribunals should operate once it has come to an end.

Please accept my apologies for the delay in sending you this report, unfortunately this was an oversight on our behalf.

If there are any matters upon which you would like clarification or further information please feel free to contact me or Ms Rhian Davies-Rees, the head of the Welsh Tribunals Unit.

Yours Sincerely

Sir Wyn Williams
PRESIDENT OF WELSH TRIBUNALS



President of Welsh Tribunals Third Annual Report 2020-2021

30 April 2021



Tribiwnlysoedd Cymru
Welsh Tribunals

Llywydd / President

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Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

1. Introduction

I began my Second Annual Report (published in June 2020 but substantially written in May) by explaining that the justice function in the UK was being transformed by the spread of Coronavirus. However, I did not foresee in May 2020 that what has become known as “the pandemic” would still be dominating how justice was being delivered throughout the UK one year on. Yet that is the reality and it seems clear that the delivery of the justice function will continue to be substantially affected by the pandemic over the coming months. That being so, it is inevitable that a substantial part of this report will focus upon how the Welsh Tribunals have dealt with the disruption inevitably brought about by the very serious threat posed to public health by Coronavirus and how they continue to adapt their practices and procedures to meet the needs of all users of the Tribunals, their members and the support staff.

In summary, however, the tribunal members and the staff of the Welsh Tribunals Unit have shown great resilience and flexibility throughout the last year. They all deserve a great deal of credit for their commitment, willingness to adapt to new ways of working and determination to ensure that the work of the Welsh Tribunals has run as smoothly as possible.

My first Annual Report provided a good deal of explanatory material about the Wales Act 2017, the office of President of Welsh Tribunals and the processes by which members of the Tribunals are recruited and appointed. I hope I can be forgiven for assuming that those who will read this Report are now fully familiar with the salient parts of the Act, the office of President of Welsh Tribunals and the processes by which members of the Welsh Tribunals are recruited and appointed. I will not repeat what I wrote in my first report.

This could have been my last annual report. My letter of appointment as President of Welsh Tribunals specifies that my term of office expires on 13 August 2021. That was always something of an anomaly since the statutory retirement age for judges in Wales and England is 70 and I reached that milestone on 31 March 2021. However, exercising the powers conferred upon him by section 26 Judicial Pensions and Retirement Act 1993, the Lord Chief Justice extended my appointment to 31 March 2022. The Lord Chief Justice took that step after first consulting the First Minister for Wales and the Lord Chancellor. I was pleased to accept the offer of an extension to my term and I am grateful for the support which I have received from the Lord Chief Justice, the First Minister and the Lord Chancellor throughout my term of office. One result of my extension is that there will be another annual report for me to write next year!

I am sure that readers of this report will be familiar with the tribunals which are known collectively as “the Welsh Tribunals”. For the avoidance of any doubt, however, I set them out as they are referred to in the Wales Act, together with the acronyms that are often used for shorthand identification of each tribunal.

Section 59 of the Wales Act 2017 defines the phrase ‘Welsh Tribunal’ to mean:

- (a) the Agricultural Land Tribunal for Wales/Tribiwnlys Tir Amaethyddol Cymru (“ALTW”);
- (b) the Mental Health Review Tribunal for Wales (“MHRTW”);
- (c) a rent assessment committee constituted in accordance with Schedule 10 to the Rent Act 1977 (including a leasehold valuation tribunal and a residential property tribunal) (“RPTW”);
- (d) the Special Educational Needs Tribunal for Wales/Tribiwnlys Anghenion Addysgol Arbennig Cymru (“SENTW”);

- (e) a tribunal constituted in accordance with Schedule 3 to the Education Act 2005 (registration of inspectors in Wales: tribunals hearing appeals under section 27);
- (f) a tribunal drawn from the Adjudication Panel for Wales/Panel Dyfarnu Cymru (“APW”);
- (g) the Welsh Language Tribunal/Tribiwnlys y Gymraeg (“WLT”).

The Welsh Tribunals are administered by the Welsh Tribunals Unit (WTU) which is part of the civil service supporting the Welsh Government but which strives to be and appear to be as independent of Government as is practicable.

The form of this report will be similar to that of last year. I will first provide factual information (an update) about numbers of cases, recruitment and appointments, cross-ticketing as between Welsh Tribunals and with English Tribunals, Practice Directions, my engagements, the working arrangements and budget of the Welsh Tribunals Unit and the use of the Welsh language within the Tribunals. I will next deal with the Commission on Justice in Wales and the Law Commission’s project on Welsh Tribunals. I will then provide my assessment of the effect of the pandemic on the work of the Welsh Tribunals before, finally, indicating my priorities for 2021/22.

2. Updates on previous Annual Reports

The number of applications received by the Welsh Tribunals in the last financial year is set out in the Table below.

Table 1: Number of applications per tribunals with percentage increase/decrease

Tribunal	Financial Year 2018-2019	Financial Year 2019-2020	Financial Year 2020-2021	% increase/ decrease	Applications processed in Welsh
ALTW	29	22	13	-41	0
MHRTW	2046	*1943	1790	-8	7
RPT	176	112	106	-5	0
SENTW	139	172	116	-34	1
APW	2	2	4	+100	0
WLT	3	16	13	-35	12

*Historically MHRTW data for annual reports was exported from a number of sources (Manual and electronic). In 2019-20 the data for applications and referrals received have been taken from the MHRTW CRM records management system removing the risk of any human error. This change in reporting methods has created the appearance of a decrease in applications and referrals for MHRTW but the probability is that had the same methodology been adopted in previous years the applications and referrals would have been of a similar order to those of recent years.

Further information about the nature of the work undertaken and the membership of each tribunal is set out in each of their annual reports. All such reports are published on the website of each tribunal.

There were no cross-ticketing exercises during the course of the year i.e. no member of a Welsh Tribunal were authorised to sit in a different Welsh Tribunal and no members of Welsh Tribunals were authorised to sit in the English Tribunals or vice versa. There were, however, a numbers of new appointments to the Welsh Tribunals. Three persons were appointed to ALT, namely two deputy chairs and one lay member. Five lay members were also appointed to SENTW. All of these appointments were made following competitions organised by the Judicial Appointments Commission. Competitions were also launched by the Commission to recruit legal members of RPTW and legal, medical and lay members of MHRTW. These recruitment exercises were not complete by 30 April 2021. The Presidents of both tribunals reported that substantial numbers of candidates put themselves forward for appointment.

It is worth noting that all legal appointments to the Welsh Tribunals are open to legal practitioners who practise in England as well as Wales. Essentially, that is because all legal practitioners in Wales and England are qualified to practice in both countries.

During the course of the year four Practice Directions (PDs) were approved by the First Minister pursuant to section 61 Wales Act 2017. Each of the four PDs were issued jointly by the President of the Tribunal concerned and me.

In October 2020 the President of MHRTW and I jointly issued a PD which extended the operational period of a PD we had issued in April 2020 by 6 months i.e. until April 2021. The PD issued in April 2020 had been issued primarily to complement rule changes which had been made to cater for possible changes in working practices arising as a consequence of the pandemic. In October 2020 we extended its operation for a period of 6 months given that there was then a very serious increase in the number of cases of Coronavirus. The PD expired in April 2021; we decided against a further extension of its provisions for reasons which are set out below in Section 4.

In June 2020 the President of SENTW and I issued a PD which was specified to subsist for 6 months. This PD was not issued as a direct consequence of the pandemic; it was issued to facilitate the work of the Tribunal in managing evidence adduced before it. In December 2020 we reviewed the operation of the PD in the light of representations received from local education authorities. On 11 December 2020 we issued a revised PD again specifying that it would subsist for a period of 6 months and that it would be reviewed towards the end of that period.

In June 2020 the President of RPTW and I issued a PD to subsist for a period of 6 months. This PD was issued to combat the challenges faced by the Tribunal as a consequences of the pandemic. It was extended for a further six month period following a review and it will be further reviewed following the expiry of that period.

Throughout the year I have attended many meetings of bodies of which I am a member (all held remotely). By virtue of my Presidency of Welsh Tribunals, I am a member of the Tribunal Judiciary Executive Board, the Administrative Justice Council and the Welsh Committee of the Judges' Council which is chaired by the Lord Chief Justice.

The Tribunal Judiciary Executive Board has judicial representation from all the constituent parts of the United Kingdom and is made up exclusively of judges. It is a very significant forum for judicial decision making in relation to the processes to be adopted within all the tribunals of

the UK. It provided an invaluable forum for discussions about working practices which should be adopted by Tribunals so as to take account of the restrictions imposed to combat the effect of the pandemic.

The Administrative Justice Council is also a UK body. It has a wide membership consisting of judges, academic lawyers, academics in fields related to justice and administrators. The head of the Welsh Tribunals Unit, a representative of the Public Service Ombudsman for Wales and I are regular attenders at Council meetings. The Council provides a forum for detailed discussions upon topics of interest relating to the workings of tribunals as well as providing detailed insight into substantive legal issues which arise within the tribunals.

The Welsh Committee of the Judges' Council is an advisory body which informs the Lord Chief Justice upon issues which relate to Wales. Its membership comprises judges at all levels from lay magistrates to Lord Lloyd-Jones in the Supreme Court. Obviously much of its time is taken up with matters arising in the courts and tribunals of England and Wales which are administered by HMCTS but the Committee receives a report from me at every meeting about all important matters relating to Welsh Tribunals which sometimes provokes considerable debate.

Each of these bodies meet quarterly and membership of each of these bodies ensures that the President of Welsh Tribunals is very well placed to keep abreast of all important developments in the tribunals which exist in all four countries of the UK.

As and when necessary I consult with the Presiding Judges of Wales. Earlier this year, for example, I consulted with them upon succession planning for the office of President of Welsh Tribunals and whether or not I should accept the offer of an extension to my term of office.

Throughout the year I have chaired quarterly meetings of the judicial leads of the Welsh Tribunals. These meetings were always intended to provide the opportunity for discussing matters of concern to the judicial leads of individual tribunals and/or matters which concern all the tribunals. I have no doubt that they have succeeded in fulfilling that goal. The meetings also provide the opportunity for direct contact between the judicial leads as a group and senior members of the WTU. When invited I have also attended meetings and training days organised by individual tribunals.

On 13 July 2020 I appeared as witness before the Legislation, Justice and Constitution Committee of the Senedd. I was asked many detailed and thought provoking questions. My answers to the various questions are, of course, a matter of public record. I am grateful to the Committee for the opportunity of appearing before them and I firmly believe that the President of Welsh Tribunals should appear at appropriate intervals to expand upon and clarify the Annual Report as well as to answer other questions relevant to the work of the tribunals.

Some months after my appearance before the Committee my Second Annual Report was the subject of a debate in a plenary session of the Senedd. This inaugural event was, without doubt, something of a milestone. Not surprisingly, the contributions of members were not narrowly confined to the four corners of my report. The debate ranged far and wide over matters relating to justice in Wales.

My annual meeting with the First Minister took place on 6 October 2020. As in previous years the First Minister was accompanied by the Counsel General and his private secretary; I was accompanied by the Deputy Director – Constitution and Welsh Tribunals and the head of WTU.

Not surprisingly, much of the conversation was taken up with the effect of the pandemic on the work of the tribunals. However, we also discussed the possibility of appointing full time salaried legal members of MHRTW, the Commission for Justice in Wales, the Law Commission project on Welsh Tribunals, the role of the President of Welsh Tribunals and succession planning in respect of that office.

I am very pleased to report that following our meeting the First Minister approved, in principle, the appointment of two salaried legal members of MHRTW in addition to the President of that tribunal (who is also a salaried member) and that the Lord Chancellor, as the appointing authority, has also approved the appointment of two salaried legal members in addition to the President. The President of MHRTW and I intend that, if at all possible, the recruitment process for the appointment of those salaried members will begin in the financial year 2021/2022.

Finally, I should record that I have had frequent discussions with the head of the WTU, more occasional discussions with other civil servants and, as and when necessary, meetings with the two Welsh Government lawyers who have been given the specific role of providing legal advice to me, the WTU and, if necessary, the individual tribunals.

Since the start of the financial year the WTU staff have been working from home in line with Welsh government guidelines. Small numbers of staff were made key workers in order to access and deal with post at the offices as and when necessary. While a great deal of the work of the Tribunals can be conducted electronically hard copies of some documents are still sent to offices. I am extremely grateful to the individuals who have worked so flexibly with the aim of ensuring that all tribunal services were maintained despite the difficult circumstances prevailing. The WTU was quick off the mark to find alternative hearing methods rather than face to face hearings when the restrictions were put in place last March, as I described in my second Annual Report.

WTU staff based at offices in Llandrindod Wells were due to be relocated in refurbished offices within the existing Powys County Council building by the end of 2020. Due to the challenges posed by restrictions this has been delayed to July 2021.

The current office space occupied by WTU is used as the headquarters of SENTW, ALTW and APW and has a room of sufficient size so as to enable it to be used as a hearing room. The new accommodation will not have a dedicated hearing room but, in any event, it would not be appropriate to conduct hearings in a building which is owned and, in part, occupied by Powys County Council given that it can sometimes be involved as a party in individual cases.

The new accommodation will provide meeting rooms that can be used by tribunal members for meetings and training events and it has appropriate space for the staff of WTU. Once the move is complete, cases brought before SENTW, ALTW and APW which require face to face hearings will be heard in locations which best meets the needs of the parties and tribunal members.

The budget for WTU is set by Welsh Government.

In the financial year 2020/2021 the allocation to WTU was £4,148,000.00. The budget makes provision for both tribunal and administrative running costs.

Total spend for the year was £3,565,246.00.

The underspend in this financial year is unprecedented during my tenure. Hitherto, there has been a significant overspend in each financial year. The reduced spending in 2020/21 was almost exclusively the result of the switch from face-to-face to remote hearings. There were no costs associated with hiring suitable hearing rooms; there were very little travelling expenses to be paid out to tribunal members and staff.

Strict financial management during the early months of the financial year enabled the return of significant funds to Central finance early in 2021.

All the Tribunals continue to offer a full Welsh language service to their users in accordance with duties imposed by the compliance notices issued by the Welsh Language Commissioner in relation to Welsh Language standards.

Whilst APW is not subject to the standards, it operates in line with the other tribunals and treats the Welsh language no less favourably than English. In each of my earlier reports I predicted that it was likely that APW would be made subject to the standards but that has not yet happened. Nonetheless, it is still expected that this will occur in the near future.

The uptake of the Welsh language service remains very low. Table 1 above shows that during 2020/21 the Welsh language was used in 20 cases across all Welsh Tribunals.

3. Commission on Justice in Wales and Law Commission project on Welsh Tribunals

In last year's annual report I drew attention to three recommendations of the Commission on Justice in Wales which were directly related to the Welsh Tribunals, the office of President of Welsh Tribunals and the administrative support provided to the Tribunals and the President by WTU. The reader will probably be aware that I was one of the Commissioners. For ease of reference I set out those recommendations again together with my updated comments.

Recommendation 22 provides that "Courts and tribunals which determine disputes in both civil and administrative law should be under one unified system in Wales".

Although the report does not say so expressly, it is implicit in this recommendation that it can be achieved only if there is substantial devolution of the justice function to Wales. As such, substantial legislation by the UK Parliament would be necessary to implement this recommendation. I am not aware of anything which would suggest that at the present time such legislation is contemplated by the UK Parliament.

Recommendation 25 provides that "All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh Tribunals should be brought under the supervision of the President."

Recommendation 27 provides that "The Welsh Tribunals Unit should have a structural independence and the Welsh Tribunals should be used for dispute resolution relating to future Welsh legislation.

These two reforms may also involve some legislation by the UK Parliament or, at the very least, amendment to legislation already enacted by the UK Parliament. Any such new legislation and such amendments to existing legislation as would be necessary to implement the recommendations would have as their aim the facilitation of the work of institutions already in existence and which operate exclusively in Wales. That said, I am in no position to judge whether there would be opposition to the necessary legislation within the UK Parliament or from others and it would not be appropriate for me to speculate upon such matters. There is no indication that the UK Parliament is contemplating legislation relating to these matters in the near future, so far as I am aware.

However, recommendation 25 and the first part of recommendation 27 are very much within the scope of the Law Commission project on Welsh Tribunals which was commissioned by the Welsh Government and which has now been gestating over a period approaching one year.

It is clear from the Consultation paper published by the Law Commission in December 2020 that the Commission has made a detailed assessment of a number of existing bodies within Wales so as to reach a conclusion about whether they should or should not be categorised as a tribunal and, if so, whether or not they should be added to the list of Welsh Tribunals within the Wales Act 2017 and/or made subject to the supervision of President of Welsh Tribunals. The Commission recommends, provisionally, that the existing Welsh Tribunals should be consolidated into a First-Tier Tribunal and that that the Valuation Tribunal for Wales should be part of the First Tier. Additionally the Commission provisionally recommends that the jurisdiction of school exclusion appeal panels should be amalgamated into SENTW.

The Commission's consultation paper has also assessed the need for the WTU to become structurally independent from Welsh Government. Provisionally, the Commission recommends that the WTU should become a non-ministerial department. If such a recommendation is maintained in the Law Commission's final report and, thereafter, implemented, there can be no doubt that WTU would become structurally independent from Welsh Government as envisaged by the Commission on Justice in Wales. The reasoning of the Law Commission in support of this recommendation is, in my opinion, compelling and I have made no secret of my view that such development would be of substantial benefit to the operation and independence of Welsh Tribunals.

In last year's report I wrote that aspects of recommendations 25 and 27 had the potential to increase the work of some of the Welsh Tribunals very substantially. That is so, in particular, by reason of that part of recommendation 27 which is to the effect that the tribunals should become the forum for dispute resolution in relation to future Welsh legislation. I remain very much of that view. The Senedd has legislative competence in the fields of health, education, housing and agriculture. If all disputes arising from future legislation in these areas of the law are to be determined by the Welsh Tribunals there is bound to be a sharp increase in the work load of the tribunals with obvious implications for the budget and the staff structure of the Welsh Tribunals Unit.

I also expressed the view in last year's report that the implementation of recommendations 25 and 27 would transform the role of President of Welsh Tribunals. I need not dwell any further upon whether that would be the effect of the recommendations of the Commission on Justice because, in its consultation paper, the Law Commission has made a number of recommendations on a provisional basis which, if implemented, would, without doubt, increase the work load of the President very substantially. The Law Commission recommends provisionally the President becomes the appointing authority for all members of Welsh Tribunals which are currently within the Act and for the members of other public bodies which may become tribunals within the Act, that he/she becomes the disciplinary authority for those members, that he/she has a role in allocating the categories of work to the various Chambers of a newly created First Tier Tribunal structure in Wales and that he/she chairs a newly created and independent WTU and a Wales Tribunal Rule Committee.

The Law Commission also recommends, provisionally, two specific judicial roles for the President of Welsh Tribunals. First, it suggests that he/she should be entitled to sit in any of the Welsh Tribunals. While it has always been my view (and that of the Lord Chief Justice) that the President was entitled to sit in the Tribunals there is no express statutory provision to that effect. Second, the Law Commission suggests that if a separate Welsh Appeal Tribunal is created in which all the appeals from Welsh Tribunals would be heard the President should be a member of that Appeal Tribunal.

I support all the provisional recommendations made by the Law Commission in respect of the office of President of Welsh Tribunals.

The statutory basis for the office of President of Welsh Tribunals is to be found in section 60 of the Wales Act 2017. It should be noted that the section provides, expressly, that the President is “not a devolved Welsh authority for the purposes of the Government of Wales Act 2006”. No doubt there is potential for a debate as to which legislative body (the Senedd or the UK Parliament) should bring forward any legislation relating to the office of President which may be necessary to give effect to the final recommendations made by the Law Commission. There is a degree of urgency in resolving this issue since, in my view, the scope of the office of President is a crucial component to be taken into account when planning for and recruiting my successor.

Currently there are two routes to appointment as President of Welsh Tribunals.

Route 1 envisages the President being appointed by the Lord Chief Justice from serving or retired members of the senior judiciary of England and Wales. The Lord Chief Justice is empowered to appoint the President from this potential pool following “expressions of interest” and after consulting the First Minister and the Lord Chancellor.

If no person emerges from this process or if the Lord Chief Justice decides against using this process he would make an appointment following consultation with the First Minister and Lord Chancellor and a competition run by the Judicial Appointments Commission (route 2).

Paragraph 3 of Schedule 5 to the Wales Act 2017 provides that a person is eligible for selection if he/she has been qualified as a barrister or solicitor for at least 7 years. There is nothing unusual about this provision; the same minimum criteria are used for appointments to the High Court and many other judicial posts. However, these criteria are the minimum required.

In practice, I would expect that the aim of any recruitment campaign would be to identify high calibre applicants. There must be a strong argument for describing the office so as to attract candidates who would have the attributes necessary for appointment to the High Court but who have decided, for whatever reason, that they do not wish to compete for a full time salaried judicial role.

Even allowing for the increased workload should the provisional recommendations of the Law Commission come to fruition, it is very likely that the President of Welsh Tribunals will not be a salaried full time appointment for many years to come; it will very likely be fee paid for many years. Accordingly, the office of President may be attractive to those who have been appointed Deputy High Court Judges or those who aspire to that position.

Clearly, if Route 2 is used as the means for appointing my successor considerable thought will be necessary in determining appropriate additional criteria for selection if there is to be a wide and diverse pool of candidates of the required ability.

To give some guide as to the demands of the role at the moment, as a retired High Court Judge, I am obliged under the 2017 Act to devote the equivalent of 20 working days per annum to the Presidency as a minimum and, in practice to date, I have found it necessary to devote about the equivalent of 25 to 30 days per year to the role (although the work to be performed is spread in such a way that I am engaged for some parts of days most weeks). If all the provisional recommendations of the Law Commission are adopted, the role of the President would be expanded very substantially. In my view, the work load of the President would very likely double.

4. The Impact of Coronavirus

The Welsh Tribunals have come to terms with disruption to normal working practices on an unprecedented scale. The lock down imposed by the Welsh Government on 23 March 2020 effectively ruled out traditional hearings at which the tribunal members and the parties gathered together in one room. Between 23 March 2020 and 30 April 2021 no such hearings took place; rather the work undertaken by the tribunals has been done either by reference to written evidence and written submissions alone or by “remote” hearings.

The number of cases considered by ALTW in the year 2020/21 fell markedly as is clear from Table 1 above. It is not possible to provide an unequivocal explanation for this decrease in work load but it is reasonable to infer that the pandemic has been a major factor in the diminution in work. Preliminary hearings and approval hearings have been possible by telephone conference and more recently by video conferencing. However, substantive hearings which have also necessitated site inspections have been difficult to arrange. Of the 13 applications received by ALT in 2020/21, five related to tenancy succession on death, one related to tenancy succession on retirement, five were concerned with Notices to quit and there were two land drainage cases. The ALT training day took place by video conferencing.

The work of RPTW was also disrupted in the weeks immediately after the first lock down in March 2020. Site visits have a part to play in some of the decisions made by this Tribunal and in many of the cases in which site visits were necessary it was extremely difficult if not impossible to observe social distancing regulations. However, RPTW was very quick to conduct its hearings by remote means. It held its first hearing by video conferencing in May 2020 and it has developed its ability to conduct all kinds of cases by such means throughout the year. The President and I jointly issued a PD in June 2020 which had the effect of facilitating the use of remote hearings; this was needed because this tribunal operates under three sets of procedural rules and clarity was essential to make clear that each set of procedural rules permitted the use of remote hearings. RPTW has been very successful in adapting its procedure so as to facilitate remote hearings – not least by adopting rigorous case management with a view to narrowing the issues to be determined as early in the proceedings as possible.

The work load of RPTW has essentially remained constant as between 2019/20 and 2020/21. All its members, supporting staff and users are to be congratulated on dealing with such a volume of work during such challenging times. It is also worth noting that RPTW has been able to organise two online training conferences for its members (held in December 2020 and March 2021).

APW traditionally has a very small numbers of cases. As it happens it dealt with one more case during 2020/21 than in the previous year. The disruption to this tribunal was substantially minimised because the governing rules of the tribunal permits some decisions to be made after consideration of written evidence and written submissions and I am informed by the President of APW that all four cases determined by APW were dealt with on the basis of written material. That is not to say that APW was not equipped to deal with remote hearings. The members received appropriate training soon after the lock down in March 2020 had been announced and remote hearings would have taken place throughout the year had the parties requested the same.

The case load of WLT diminished to an extent during 2020/21.

It is difficult to offer a reason but it is unlikely to have been due to the effects of the pandemic.

Over the years since its coming into existence the case numbers in this tribunal have fluctuated substantially and it is more probable than not that there will continue to be a fluctuation in numbers.

The rules governing WLT permit remote hearings and determinations on the basis of written material. Of the seven appeals considered in 2020/21 three appeals were rejected, two were allowed and two were not resolved in that year. All the appeals were determined by reference to written submissions.

SENTW deals with cases which are primarily focussed upon the educational needs of vulnerable children. As soon as traditional face-to-face hearings ceased it began exploring the best ways of dealing with cases remotely. Its members received appropriate training and espoused remote hearings with enthusiasm. The President has consistently reported that hearings by video conferencing have proved to be a great success. A constant theme has been that the parents of children with special educational needs positively prefer hearings by remote means since they are, in the main, able to participate from their own homes and, in consequence, feel more relaxed and better able to participate. All the members of the tribunal and the staff which support them are to be congratulated for the flexibility and commitment shown in developing alternative methods of working.

Table 1 shows that there was a substantial decrease in the number of cases dealt with in 2020/21 compared to 2019/20 although the number of cases dealt with in 2020/21 was much closer to the numbers dealt with in 2017/18 and 2018/19 (albeit lower than both those years). I do not have the evidential base to determine whether the pandemic has caused or contributed to the fall in numbers of cases in 2020/21 but, in my view, some research in relation to this issue is justified given the clear need to ensure that the education of vulnerable children is not compromised. I will be asking the President of SENTW and the Head of WTU to organise the necessary work.

MHRTW has, by far, the largest numbers of cases of any Welsh Tribunal. Most of the cases before the tribunal which require a hearing have traditionally taken place at hospital. Since the lockdown was imposed in March 2020 no face-to-face hearings at hospitals have been possible with the consequence that the Tribunal has had to adapt to remote hearings. Over the course of the year all cases requiring a hearing have been conducted over the telephone. In the early days of the spread of Coronavirus and, in particular, as the first lockdown approached there was a genuine concern that MHRTW would be unable to deal with a case load approaching 2000 cases per annum. In consequence there was a need for urgent decisions about whether the procedural rules governing MHRTW were in need of amendment.

Although MHRTW is a Welsh Tribunal under the Wales Act 2017 it was created many years ago by legislation enacted by the UK Parliament. Over the years the procedural rules applicable in England which govern the equivalent body to MHRTW have diverged from the rules which govern MHRTW.

In summary, the rules in England have provided for much greater flexibility in the process of decision making. So, for example, for some years in England it has been possible to constitute a tribunal by one or two members (as opposed to three) in order to make decisions in certain types of cases whereas in Wales that has not been possible.

Further, the tribunal in England has had the ability to decide cases by reference to written material alone if certain criteria are met whereas that has not been the case in Wales. Once it became known that the UK Parliament intended to enact the Coronavirus Act 2020 strenuous efforts were made to ensure that the legislation included provisions specific to MHRTW to ensure that it could work as flexibly as its English counterpart.

No doubt through a great deal of hard work on the part of many people and, further, through co-operative working between civil servants in Wales and England suitable provisions were drafted specific to MHRTW and incorporated into the Act.

As a consequence MHRTW was enabled to work as flexibly as its English counterpart for so long as it was thought appropriate by legislators.

I wholeheartedly supported the rule changes in Wales (as did the President of MHRTW) and with the First Minister's approval the President of MHRTW and I were able to issue, jointly, a Practice Direction relating to the work of MHRTW, so as to supplement the rule changes in Wales.

As time went by, however, the rule changes and the PD were the subject of criticism from some of the lawyers who practise in the field of mental health. Further, the rule changes were the subject of criticism by the Equality, Local Government and Communities Committee of the Senedd in its report entitled "Into sharp relief: inequality and the pandemic". There were concerns that the protections afforded to patients by decisions being taken by three members (as opposed to a lesser number) and following oral hearings were being eroded.

I understand why these concerns were expressed. Nevertheless, in the early days of the pandemic and when social distancing rules were at their most restrictive as cases of Coronavirus reached their peaks there was a real risk that assembling three members for every hearing (albeit conducted remotely) would prove impossible to achieve for lack of the necessary numbers of members who were ready, willing and able to work throughout the pandemic.

The whole point of the rule changes was to prevent a situation developing in which some cases were simply not heard at all as might have been the case if members of MHRTW themselves became ill either with Coronavirus or other ailments. A significant number of the most experienced members of MHRTW are aged over 60 and prior to vaccination were themselves at risk of significant illness should they contract Coronavirus.

As it happens it has never been necessary to reduce the number of members hearing a case from the full complement of three. Further, it has never been necessary to determine a case by reference only to written material. The Tribunal has delivered a full programme of hearings in every category of case with a fully constituted panel and without any undue delay or backlog of hearings. That this has been possible is to the great credit of the members of MHRTW and the staff that has provided unstinting support.

Upon the expiry of the PD which had been extended for a period of six months from October 2020 the President of MHRTW and I decided that it would not be further extended. That was possible because of the falling numbers of persons suffering from Coronavirus and, as I have said, the commitment of the members of the Tribunal and the support staff. At the time of writing I do not expect that the PD will be revived although it should be noted that the provisions within the Coronavirus Act 2020 referred to above have not been repealed and so could be invoked if the need arose.

As Table 1 demonstrates the Tribunal has received a large number of cases during the year (albeit the numbers are reduced in comparison with previous years). MHRTW has sought to understand why the number of cases received in 2020/21 has reduced by about 8%.

The fall in numbers is explained in the main by a fall in the number of applications made by or in relation to patients in the community.

Given the social distancing restrictions in operation over much of the year it seems to me that there is likely to be a direct link between the reduced number of “community cases” and the pandemic. I have seen no evidence which suggests that the fall in the number of cases has been substantially caused or contributed to by the fact that hearings have, of necessity, been conducted remotely.

That is not to say that there has been no expressions of disquiet about remote hearings. As I explained above, MHRTW has conducted hearings throughout the year by telephone.

There has always been some pressure from some patients and their lawyers to conduct hearings by video conferencing. The President of MHRTW and her team of deputies has kept this possibility under review for some months and I understand that trialling of video conferencing hearings will begin shortly, if they have not already begun by the date of publication of this report.

The logistical difficulties of conducting hearings by video conferencing should not, however, be underestimated. Not all hospitals in which patients are detained are equipped for such hearings. Not all patients would welcome video conference hearings. There is a need, so far as is reasonable and proportionate, for consistency of treatment of patients in the way that hearings are conducted.

No doubt, once some hearings have taken place by video conferencing, MHRTW will undertake a detailed assessment of the circumstances in which different forms of remote hearings can be deployed. I will give MHRTW my full support in reaching appropriate conclusions.

I do not pretend that the challenges posed by the pandemic have been overcome in all instances without disruption. I am quite prepared to accept that there will have been instances in which cases may not have run as smoothly as they would have done had traditional face-to-face hearings been available.

Nonetheless I can say with a good deal of confidence that the flexibility which all the tribunals have shown in adapting their ways of working during this most difficult of times has been crucial in ensuring that the tribunals have operated efficiently and expeditiously and in accordance with the overarching aim of delivering justice to all participants.

5. Priorities for 2021/22

First and foremost there will be the need to assess and evaluate how the tribunals should operate from the time that the pandemic comes to an end. I have a statutory duty under the Wales Act 2017 to devise innovative methods of resolving disputes which are brought before the tribunals and, without doubt, the pandemic has forced the judicial leads of the tribunals and me to think about ways of working which were unimaginable to most tribunal users prior to March 2020.

A crucial issue for detailed consideration is the extent to which remote hearings are retained once traditional face-to-face hearings become possible. There can be no doubt that remote hearings are likely to prove less costly to organise. There can be no doubt, too, that some users of the tribunals feel far more comfortable participating from their own home or other familiar surroundings than is the case when they are in a more formal setting.

However, the overarching object of each tribunal is to deliver justice and there can be no doubt, in my opinion, that traditional face-to-face hearings are a better model for achieving justice when there are contentious and crucial factual issues in dispute which are dependent for their resolution upon oral sworn evidence from witnesses. There may also be circumstances which are particular to individual tribunals which make face-to-face hearings either necessary or, at least, very desirable.

Over the course of the coming months the judicial leads and I will be making an In-depth assessment of the current procedural rules governing each tribunal and what should be done to develop criteria by which decisions are made as to whether remote or face-to-face hearings are held. In this respect we will be very much assisted by emerging detailed research which has been undertaken upon the use of remote hearings during the pandemic. Just as I was completing this report the Legal Education Foundation published the results of its research into remote hearings during the early months of the pandemic. I could not do justice to an erudite, detailed and lengthy report by attempting a summary in an annual report. This research, and other similar reports, however, will be the foundation stones for the work of tribunals in the years to come.

I have three other important priorities. First, to respond appropriately to the final recommendations about Welsh Tribunals which are likely to be published by the Law Commission in the autumn, in particular those relating to the office of President of Welsh Tribunals and the status of the WTU. Second, to provide assistance, if required, in relation to the transition from SENTW to “the Education Tribunal” which will happen later this year by virtue of legislation made in Wales entitled the Additional Learning Needs and Education Tribunal (Wales) Act 2018. Third, if required, to assist in devising criteria for appointment of salaried legal members of MHRTW.

The office of President of Welsh Tribunals has proved to be more demanding than I envisaged when I took office in the autumn of 2017. I believe that would have been so even without the intervention of the pandemic. However, it has been an honour to have been involved in the very early stages of a project to develop Welsh Tribunals as bodies for dispute resolution which are truly fit for purpose in the second decade of the Twenty First Century.



Sir Wyn Williams
President of Welsh Tribunals



WRITTEN STATEMENT BY THE WELSH GOVERNMENT

TITLE	Update on the development of the justice system and the legal sector in Wales
DATE	30 September 2021
BY	Mick Antoniw MS, Counsel General and Minister for the Constitution

I wanted to update Members on the actions we are taking to follow through on our manifesto and Programme for Government commitment to pursue the case for the devolution of justice and policing to Wales.

The Commission on Justice in Wales (Thomas Commission) delivered a landmark report, *Justice in Wales for the People of Wales*, in October 2019 with a comprehensive set of recommendations setting a future vision for justice in Wales. While the pressing need to reprioritise resources during the past 18 months to tackle the Covid-19 pandemic has slowed the pace at which we have been able to implement the recommendations, we are making progress on a number of important fronts.

In July, I chaired the first meeting of the Welsh Government's reconvened Cabinet Sub-Committee on Justice. I agreed with the First Minister and the Minister for Social Justice that as we entered a different phase of the pandemic the time was right to kick-start conversations with the UK Government about the future of justice in Wales. The First Minister wrote to the then Lord Chancellor to express strong disappointment that the UK Government had rejected the Thomas Commission report's central recommendation, while emphasising there is a large number of other recommendations that are achievable under the current devolution arrangements or involve some element of devolution without transferring responsibility for justice in its entirety. For example, there is a strong case for devolving the youth justice system, which the Silk Commission also recommended in 2014.

We will continue to make the case for devolving justice and policing, and work with stakeholders to explore how best to achieve it. I expect the upcoming Constitutional Commission will also consider these issues. In the meantime, based on correspondence with the previous Lord Chancellor, we expect discussions between the two governments will begin shortly. We intend they will cover the range of topics within the Thomas Commission's report, including the need for disaggregated justice data for Wales, ensuring people can access court services as they are digitised, exploring the possibility of problem-solving courts in Wales, support for advice service providers; diversity in justice system agencies, the quality and location of court buildings, Welsh language provision in the justice system, and the organisation of the senior judiciary including representation on the UK Supreme Court.

Alongside those discussions with the UK Government, we will continue to pursue existing programmes of partnership working. We are working with Her Majesty's Prison and Probation Service, the Home Office and the Police and Crime Commissioners on the Youth Justice and Female Offending Blueprints, including the establishment of a Residential Women's Centre in Wales and the development of a new delivery model for the Welsh secure estate for justice and looked after children.

We are also progressing our own programme of work on Thomas Commission recommendations within the gift of the Welsh Government and other Welsh actors. A key area is family justice. The Thomas Commission shared our concerns about the numbers of children in Wales taken into care, and considered the important role partners in the justice system have in caring for children in Wales. We are working collaboratively with justice partners in Wales to take forward recommendations of the Family Division's Public Law Working Group designed to keep families together, and expecting the launch this autumn of the first Family Drug and Alcohol Court in Wales through a pilot in Cardiff. The North Wales Local Family Justice Board is one of two pathfinder areas in England and Wales taking part in a pilot programme to test and evaluate a revised Child Arrangements Programme on behalf of the Family Division's Private Law Working Group. The aim is to promote non-adversarial and problem-solving approaches to cases and reduce backlogs through better case management.

It is essential we have a vibrant legal sector in Wales to ensure all people, businesses and communities have easy access to the advice they need when they need it, and to support our vision for a better justice system for the people of Wales. We are working with the legal sector on a package of measures to support its long-term development through business and digital support, cyber security and procurement of legal services, tailored to the particular needs of commercial law firms, high street practices and the bar.

A key Thomas Commission recommendation was setting up a Law Council of Wales to promote the interests of legal education and the awareness of Welsh law, ensure proper provision of teaching the law in Welsh, and assist students in their education and training as future practitioners. We have been working with the legal sector during the past year to establish the Law Council. I am pleased to report we have consistently

encountered enthusiasm to participate in it. Accordingly, I have now invited the proposed members of its Executive Committee to an initial meeting in November, which we expect will be the precursor to the formal instigation of a Law Council shortly after. While it will be for the Law Council itself to determine its precise remit, based on discussions with the sector we anticipate it will extend beyond legal education and Welsh law to cover economic development of the sector and legal technology and innovation.

We are continuing to work to achieve the best possible outcomes through existing devolved justice functions. The Welsh tribunals have adapted well to the unprecedented disruption to their normal working practices from the pandemic. Their continuing operation, ensuring users have been able to continue accessing justice, is testimony to how effectively the judiciary and administrators of the tribunals, led by the President of Welsh Tribunals Sir Wyn Williams, have responded to truly exceptional circumstances. I commend to Members Sir Wyn's latest annual report for 2020-2021, and we intend to make time for discussion of the report in plenary session.

In his first report to March 2019, Sir Wyn reflected on the Wales Act 2017 establishing the office of President of Welsh Tribunals and defining the Welsh tribunals, describing it as the “...*commencement of a journey towards providing for Wales a tribunal system which is modern, flexible [and] capable of responding to the reasonable needs of all tribunal users...*”. That journey has continued with a Law Commission project to review the law governing the operation of our devolved tribunals and recommend reforms to bolster their independence and effectiveness. This important project is identifying the structural reforms we can make for a modern tribunal system for Wales as another important step towards building a devolved justice infrastructure for Wales. The Law Commission's consultation closed in March, and I anticipate receiving its final report this autumn and considering its recommendations to pave the way for a Bill that will give effect to specific Welsh policy in this important area.

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Ein cyf/Our ref MA-JH-3249/21

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee

28 September 2021

Dear Huw,

Thank you for your letter of 22 September regarding the Legal Consent Memorandum: Police, Crime, Sentencing and Courts Bill.

I was pleased to have been able to present the LCM to you on Monday 20 September. I have answered your questions as set out below.

Question 1: Justification for seeking the consent of the Senedd in respect of the following clauses is provided briefly in paragraphs 9 and 10 of the Memorandum:

Clause 1 (Police Covenant);

Clause 2 (Increase in penalty for assaults on emergency workers);

Clauses 7-8, 10-16, 19-22 (Functions relating to serious violence); and

Clauses 23-35 (Offensive weapons homicide review).

Please could you provide additional detail to explain and clarify why the Senedd's consent should be sought for these provisions?

Clause 1 - 'Police Covenant'. This establishes a duty on the Secretary of State (SoS) to publish an annual report on the Police Covenant and present this to Parliament. The annual report on progress against the covenant may relate to devolved matters such as health and family support services. The clause may require the Welsh Ministers, NHS Wales or a devolved Welsh authority to provide the SoS with information on the effects of service in the police force on matters such as health and well-being, family support and any other matter the SoS considers appropriate. The UK Government acknowledges that some of the issues that will need to be addressed by the annual report on progress against the Covenant may relate to devolved matters in Wales.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Clause 2 – Increase in penalty for assault on emergency worker amends section 1 of the Assaults on Emergency Workers (Offences) Act 2018, increasing the penalty from 12 months to 2 years. The broad purpose of increasing the penalty for this offence is to protect emergency services workers (by further deterring people from committing the offence) and thereby to protect the provision of those services and individuals. This clause makes provision with regard to devolved matters because its aim includes protecting NHS workers and those working in the Fire and Rescue Service.

Clauses 7-8, 10-16, 19-22 (Functions relating to serious violence) – A new duty will be placed on specified public bodies to collaborate and plan to prevent and reduce serious violence, with a corollary duty to prepare and implement a strategy. These include devolved Welsh authorities (“DWAs”) such as Local Authorities, Local Health Boards and Fire and Rescue Authorities. The UK Government acknowledges that the provisions relating to the serious violence duty should be subject to the LCM process.

Clauses 23-35 (Offensive weapons homicide review) – Reviews will bring together local safeguarding partners to conduct a formal review of homicides where an offensive weapon has been used. The partners responsible for the review includes DWAs such as Local Authorities and Local Health Boards. The UK Government acknowledges that the provisions relating to offensive weapons homicide review should be subject to the LCM process.

Question 2: Paragraphs 13 and 14 of the Memorandum state that the Welsh Government will recommend that the Senedd refuses to give consent to clauses 9, 17 and 18 of the Bill. This is due to a concern that the provisions would allow the Secretary of State to issue directions for the purposes of enforcing the serious violence duty, which could potentially include issuing directions on devolved matters which fall within the remit of devolved Welsh authorities. Please can you clarify which devolved matters you are referring to?

The serious violence duty will place responsibilities on a number of public authorities to collaborate and plan to prevent and reduce serious violence. Some of those bodies fall within the remit of devolved Welsh authorities these are: Local Authorities, Local Health Boards, and Fire and Rescue Authorities. In addition there will be some responsibilities placed on educational establishments to collaborate.

As currently read, the Bill would allow the Secretary of State to direct these authorities to collaborate without the consent of the Welsh Ministers. The Welsh Government is hopeful that an amendment will be laid to commit the Secretary of State to gain consent from the Welsh Ministers prior to using this power where it is levied at devolved matters.

Question 3: Please can you explain why the Welsh Government believes the following clauses are within the legislative competence of the Senedd and, in addition, explain why the Senedd should give its consent to these clauses:

Clauses 36-37 and 40-41 (Extraction of information from electronic devices); and Clause 43 (Pre-charge bail).

The broad purpose of the power to extract information from an electronic device in this provision may be described as the protection or safeguarding of individuals. One of the circumstances in which this provision may be used is in protecting a child or an at-risk adult. Safeguarding issues fall within the legislative competence of the Senedd and are addressed in the Social Services and Well-being (Wales) Act 2014, for example.

Question 4: Please can you explain why clauses 38 and 39 are not mentioned in the Memorandum, given that they are part of the suite of provisions that deal with extraction of information from electronic devices (which the Welsh Government consider require consent)?

As opposed to the clauses referred to in Question 3, clauses 38 and 39 do not require a LCM as the primary purpose of these clauses relate to the reserved matters of the prevention, detection and investigation of crime.

Question 5: Please can you explain why the Welsh Government believes clause 42 (authorised persons) is within the legislative competence of the Senedd and clarify whether it considers that the Senedd should give its consent to that clause?

Given the wide ranging definitions of who can be nominated authorised persons, investigating officer and prosecution authority included in clause 42 (as set out below), it is likely that this could encompass officers and authorities that are not reserved such as Local Authorities.

We would recommend that consent is given to clause 42.

Question 6: Please can you explain why the Welsh Government considers the effect of clause 46 (Criminal damage to memorials: mode of trial) would be to increase the potential sentence for criminal damage to life imprisonment in circumstances where the defendant intended or was reckless as to danger to life? The Committee has received advice that this offence is indictable only and already therefore attracts a maximum penalty of life imprisonment under section 4(1) of the Criminal Damage Act 1971.

We agree that an offence under s.1 (2) of the Criminal Damage Act 1971 of damage to property which (intentionally or recklessly) endangers life is already indictable only and subject to life imprisonment. However the effect of s.22 and paragraph 1 of Schedule 2 to the Magistrates' Courts Act 1971, is that if the value of the damage to the property is below £5,000, whether or not life was endangered by the damage/destruction, the mode of trial (and therefore the sentence it attracts) is subject to change. The only offences under s.1 of the 1971 Act that are excluded from the effect of Schedule 2 to the 1980 Act, are offences where the damage or destruction is caused by fire.

The amendment made by clause 46 is to exclude the application of Schedule 2 to offences where (a) the damage/destruction is caused by fire and (b) any offences where the damage/destruction, is to a memorial.

Question 7: In the Memorandum, the Welsh Government recommends that the Senedd grant consent to clause 59 (Causing public nuisance), and withhold consent to clauses 61 to 63 (Unauthorised encampments). Please can you explain why the Welsh Government believes all four clauses require consent?

Unauthorised encampments

These clauses relate to offences of residing on land without consent in or with a vehicle and powers to seize and forfeit vehicles. As the clauses relate to use of land, preventing the unlawful occupation of land and associated behaviours, there is an argument that they are within the legislative competence of the Senedd.

Causing Public nuisance

Part 3, Sections 54-60 of the Bill sets out numerous provisions relating to public order directions and offences. The noise element of these sections relates to the devolved matter of environmental protection.

Section 59 provides for an offence of intentionally or recklessly causing public nuisance. This replaces the existing common law offence of public nuisance with a new statutory offence and can capture a broad range of behaviour.

Yours,

A handwritten signature in black ink that reads "Jane Hutt". The signature is written in a cursive style with a long horizontal line above the first few letters.

Jane Hutt AS/MS

Y Gweinidog Cyfiawnder Cymdeithasol
Minister for Social Justice

Jane Hutt MS
Minister for Social Justice

22 September 2021

Dear Jane

Legislative Consent Memorandum: Police, Crime, Sentencing and Courts Bill

At our meeting on Monday, 20 September, we considered the Welsh Government's Legislative Consent Memorandum on the UK Government's Police, Crime, Sentencing and Courts Bill. There are a number of issues on which the Committee requires further information. Given our reporting deadline of 14 October 2021, we would be grateful to receive a response from you by noon on 30 September 2021.

Question 1: Justification for seeking the consent of the Senedd in respect of the following clauses is provided briefly in paragraphs 9 and 10 of the Memorandum:

Clause 1 (Police Covenant);

Clause 2 (Increase in penalty for assaults on emergency workers);

Clauses 7-8, 10-16, 19-22 (Functions relating to serious violence); and

Clauses 23-35 (Offensive weapons homicide review).

Please could you provide additional detail to explain and clarify why the Senedd's consent should be sought for these provisions?

Question 2 Paragraphs 13 and 14 of the Memorandum state that the Welsh Government will recommend that the Senedd refuses to give consent to clauses 9, 17 and 18 of the Bill. This is due to a concern that the provisions would allow the Secretary of State to issue directions for the purposes of enforcing the serious violence duty, which could potentially include issuing directions on devolved

matters which fall within the remit of devolved Welsh authorities. Please can you clarify which devolved matters you are referring to?

Question 3: Please can you explain why the Welsh Government believes the following clauses are within the legislative competence of the Senedd and, in addition, explain why the Senedd should give its consent to these clauses:

Clauses 36-37 and 40-41 (Extraction of information from electronic devices); and
Clause 43 (Pre-charge bail).

Question 4: Please can you explain why clauses 38 and 39 are not mentioned in the Memorandum, given that they are part of the suite of provisions that deal with extraction of information from electronic devices (which the Welsh Government consider require consent)?

Question 5: Please can you explain why the Welsh Government believes clause 42 (authorised persons) is within the legislative competence of the Senedd and clarify whether it considers that the Senedd should give its consent to that clause?

Question 6: Please can you explain why the Welsh Government considers the effect of clause 46 (Criminal damage to memorials: mode of trial) would be to increase the potential sentence for criminal damage to life imprisonment in circumstances where the defendant intended or was reckless as to danger to life? The Committee has received advice that this offence is indictable only and already therefore attracts a maximum penalty of life imprisonment under section 4(1) of the *Criminal Damage Act 1971*.

Question 7: In the Memorandum, the Welsh Government recommends that the Senedd *grant* consent to clause 59 (Causing public nuisance), and *withhold* consent to clauses 61 to 63 (Unauthorised encampments). Please can you explain why the Welsh Government believes all four clauses require consent?

I am copying this letter to Jenny Rathbone MS, Chair of the Equality and Social Justice Committee.

I look forward to receiving your response by 30 September.

Yours sincerely,



Huw Irranca-Davies
Chair

Agenda Item 6

By virtue of paragraph(s) vi of Standing Order 17.42

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Agenda Item 8

By virtue of paragraph(s) vi of Standing Order 17.42

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